

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE

Assigned on Briefs February 14, 2006

**STATE OF TENNESSEE v. KENNETH C. DAILEY, III**

**Direct Appeal from the Criminal Court for Davidson County**  
**No. 2004-B-1779     Steve Dozier, Judge**

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**No. M2005-01223-CCA-R3-CD - Filed July 18, 2006**

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The defendant, Kenneth C. Dailey, III, pled guilty in the Criminal Court of Davidson County, Tennessee, to the charge of second degree murder (Class A felony), reserving a certified question of law pursuant to Tennessee Rule of Criminal Procedure 37(b)(2)(I) and agreed to a thirty-year sentence as a Range II, violent offender, to serve 100% of his sentence. The certified question relates to the defendant's confession and whether it is inadmissible against the defendant because he was in custody and was not properly Mirandized. We conclude the record before us does not demonstrate that the certified question is dispositive of the case, and we dismiss the appeal.

**Tenn. R. App. P. 3 Appeal as of Right; Appeal Dismissed**

JOHN EVERETT WILLIAMS, J., delivered the opinion of the court, in which DAVID H. WELLES and THOMAS T. WOODALL, JJ., joined.

J. Carlton Drumwright, Nashville, Tennessee, for the appellant, Kenneth C. Dailey, III.

Paul G. Summers, Attorney General and Reporter; Preston Shipp, Assistant Attorney General; Victor S. (Torry) Johnson, III, District Attorney General; Pamela Sue Anderson, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

Facts and Procedural History

The defendant was originally charged with the first degree (premeditated) murder of Nancy Marie Lyons, whose body was discovered in a junk car at the defendant's place of employment. During the investigation, the defendant gave a statement to police, confessing to the murder. The defendant entered a plea of guilty to the lesser charge of second degree murder, reserving the following certified question of law: Whether the defendant was subject to a custodial interrogation by Metro Police Detectives on or about May 4, 2004, such that his subsequent statements were taken in violation of his rights pursuant to article I, section 9 of the Tennessee Constitution, the Fifth

Amendment of the United States Constitution, and the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

At the plea acceptance hearing, the State offered the following recitation of facts:

[O]n April twenty-first, two-thousand-and-four, an employee of Tommy's Wrecker Service, which is located here in Nashville, Davidson County, discovered the body of Miss [N]ancy Marie Lyons.

Miss Lyons was lying the backseat floorboard of an abandoned or – or basically junked vehicle, there at the business of Tommy's Wrecker Service.

Metro Police were called to the scene to investigate and discovered that Miss Lyons had died some days before; that around her neck was a yellow, nylon rope. She was transported to the Medical Examiner's Office where she was examined.

The police investigated and, after speaking with various persons, were led to suspect the Defendant, Ken Dailey, who was an employee. Mr. Dailey was requested to come to the Police Department, where he was interviewed by the Metro Police detectives.

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Police detectives interviewed the Defendant. He initially denied having any involvement whatsoever with Miss Nancy Marie Lyons.

However, as the interview progressed, the Defendant admitted that he met Miss Nancy Marie Lyons. He stated that he had picked her up on the seventeenth of April, in the evening hours, and had brought her back to the shop at Tommy's Wrecker Service.

They at that time had sex in the bedroom, in exchange for thirty dollars. After the sexual act was completed, there became and [sic] argument concerning the amount of money.

According to what the Defendant told the police, Miss Lyons threatened to call the police. At that time Mr. Dailey then pushed Miss Lyons to the floor and strangled her manually, until she was not breathing. He then took a piece of yellow, nylon rope from the office and wrapped it around her neck. He stated to the police that he did this in an attempt to conceal her – conceal his prints and to throw the police off the trail.

He admitted that he was the person who then placed Miss Lyons' body into the car, where she was ultimately found.

The defendant agreed with the State's statement of facts and entered his guilty plea, reserving the certified question of law. We also have for our review the entire plea colloquy and the transcript of the hearing on the defendant's motion to suppress the defendant's statement, which the trial court had earlier denied.

We conclude that the record before us does not demonstrate that the admissibility of the defendant's confession is dispositive of this case, and we dismiss this appeal.

### Analysis

Our first task upon review is to determine whether the record before us reveals that the certified question of law is dispositive of this case. "The issue of whether the question of law, as presented, is dispositive is critical to appellate review as generally an appeal does not lie from a guilty plea conviction. The appellate court is not permitted to assume jurisdiction of a case based upon agreement of litigants and the trial court." State v. Hawkins, No. M2002-01819-CCA-R3-CD, 2003 Tenn. App. LEXIS 1142, at \*6 (Tenn. Crim. App. April 6, 2004, at Nashville). As we are directed by our supreme court in State v. Preston, 759 S.W.2d 647, 651 (Tenn. 1988), "[b]efore reaching the merits of a certified question, the appellate courts must first determine that the district attorney general and the trial judge found the certified question to be dispositive of the case and then determine if the record on appeal demonstrates how that question is dispositive of the case. State v. Jennette, 706 S.W.2d 614, 615 (Tenn. 1986). If the appellate court does not agree that the certified question is dispositive, appellate review should be denied." Preston, 759 S.W.2d at 651 (opinion on petition to rehear). The burden is on the defendant to see that the record brought to the appellate courts contains all of the proceedings below that bear upon whether the certified question of law is dispositive and the merits of the certified question. State v. Pendergrass, 937 S.W.2d 834, 836-37 (Tenn. 1996) (quoting Preston).

The record before us seems sufficient to address the merits of the certified question as it contains the transcript of the defendant's motion to suppress the defendant's statements to police. We, however, conclude the record before us is lacking upon showing how the certified question of law is dispositive of this case.

The record reveals the following relevant portions as relates to the dispositive nature of the defendant's confession:

THE COURT: All right. General Anderson, on Dailey, before – lemme ask this, before I bring him up. And the reason I'm doing this is 'cause I've run into this problem before.  
Is it the State's position that, absent these statements from Mr. Dailey to the police, that the State could not proceed?

GENERAL ANDERSON: Yes, Your Honor, it is dispositive. Our proof is timed with the – his statement. That – we would, however, not limit ourselves, should further evidence be developed at a later time.

But, as the evidence stands at this time, Your Honor, it would be dispositive and we would not be able to proceed.

The defendant offered no statements as to the dispositive nature of the certified question. The Rule 16 judgment forms contain the following: "Further, all parties agree that this question is dispositive of the case." Also, an agreed order which was incorporated by expressed reference into the Rule 16 judgment of conviction contained the following language: "Testimony was given by Detective Mike Roland that the State's proof of Defendant's guilt consists entirely of the statements he gave on May 4, 2004, thereby making this question dispositive of the case." Neither the State's nor the defendant's briefs mention the issue of the dispositive nature of the certified question nor does the defendant's brief cite to any evidence or statements to show how the certified question is dispositive other than to say that "all parties agreed that the issue is dispositive of the case."

This record lacks the requisite explanation as to how the defendant's confession is dispositive of this case. The trial court made inquiry of the State, and the State opined the certified question was dispositive without any explanation. What investigation was done as relates to this murder case? What other evidence might the State have that would link this defendant to this murder? What is the District Attorney's explanation as to why the State cannot proceed without the defendant's confession? All are questions the answers to which would greatly assist this court in determining our first responsibility, to ensure the record reflects how that the certified question is dispositive. From the sparse record we have, it is clear that Nancy Marie Lyons was murdered and did not die by accident or natural causes. Her body was found in the back seat floorboard of a junked vehicle at the defendant's place of employment. The defendant would have access to the location where the body was found, unique to others, as well as knowledge of the junk car. The victim's body was examined by the medical examiner's office; presumably, samples were taken or could be taken that could confirm the recent sex act between the defendant and the victim without need of the defendant's confession. Other forensic and circumstantial evidence may be available to the prosecution connecting the defendant to this murder.

The prosecutor's statement to the trial court was equivocal. The prosecutor indicated that he did not wish to be "limited" in the event other evidence became known. By agreeing to send a certified question of law to us on a murder, the prosecutor is indeed limiting the State and this court to two alternatives: one, affirm the conviction or, two, dismiss the case against the defendant in which event jeopardy has attached and the State would be barred from ever pursuing charges against this defendant on these facts.

A prosecutor should be mindful that in stipulating that a certified question is dispositive in a murder case, the prosecutor is in essence saying to the appellate courts that the State does not wish to investigate this case any further and has no other evidence in which to make out a prima facie case against the defendant. Also, the prosecutor is saying to the appellate courts that, should we find the defendant prevails on the certified question of law, we should dismiss the charges against the defendant as there is no admissible evidence in which to prove that a crime was committed or that the defendant committed it.

### Conclusion

In part, because of the all-or-nothing approach inherent in allowing a certified question of law, our supreme court has required that the record reflect how the certified question is dispositive. This record lacks such an explanation and is presented to us only by the agreement of the parties. We are required to dismiss this appeal.

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JOHN EVERETT WILLIAMS, JUDGE